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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 520

ALLEN POPE,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF

GEORGE ROBERT SHIELDS,
Counsel for Petitioner.

HERMAN J. GALLOWAY,
JOHN W. GASKINS,
FRED W. SHIELDS,
Of Counsel.



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THE UNITED STATES,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Opinion Below

The opinion of the Court of Claims (R. 47-60) is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered October 1, 1945 (R. 146). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925,

as amended by the Act of May 22, 1939, and Section 4 of the Special Act of February 27, 1942 (see below).

Question Presented

The question now presented is, has the Court properly interpreted and applied the Special Act of February 27, 1942 (56 Stat. 1122), in accordance with the decision and mandate of this Court?

Statute Involved

The only statute involved is the Special Act of February 27, 1942, Private Law 306, 77th Congress, reading as follows:

"AN ACT

"To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation

and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel; *and for the work of excavating materials which caved in over the tunnel arch* and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases" (*Italics added*).

Statement

Petitioner some years ago contracted to construct a large tunnel forming a part of the District of Columbia water supply system. Numerous disputes arose between him and the contracting officer, some of which, not being adjusted satisfactorily, were carried to the Court of Claims. That Court (76 C. Cls. 64) allowed some of the claims

asserted and disallowed others. Motions for new trial were overruled and a review by this Court was denied, 303 U. S. 654.

He, thereafter, sought relief from Congress, and the Special Act, Private Law 306, 77th Congress, was enacted (R. 1).

A petition under the Special Act was filed in the Court of Claims on July 7, 1942 (R. 1-9). Additional testimony to that taken in the old case was taken. The Court of Claims, concluding that the Special Act constituted a Congressional interference with judicial prerogatives and was therefore unconstitutional, dismissed the petition (100 C. Cls. 375).

This Court granted certiorari (321 U. S. 761), and, on review, reversed the Court of Claims, 323 U. S. 1.

Thereafter, in supposed compliance with the mandate of December 5, 1944, the Court of Claims reconsidered the claims under the Special Act and allowed some of them but disallowed one large and important item, namely, that for pay, at the contract rate for excavation, for excavating materials which caved in from over the tunnel arch (R. 63, 83). The petitioner now seeks review of this latest judgment, as contrary both to the Act, properly interpreted, and to the mandate of this Court.

Specification of Errors to Be Urged

The Court of Claims, under mandate, erred:

1. In deciding, in effect, that the Special Act of February 27, 1942, does not create a new cause of action on account of the "work of excavating materials which caved in over the tunnel arch."

2. In deciding the item of claim for "the work of excavating materials which caved in over the tunnel arch"

on the basis of the *contract* and not on the basis of a *new cause of action* created by the Special Act.

3. In holding (R. 73), "There is no intimation, either in the special act or the committee reports that Congress intended to create, for the plaintiff, rights to recover for them" (for excavation of caved-in materials).

4. In failing to render a judgment at the contract rates for excavation for the established quantities of materials excavated as a result of cave-ins from over the tunnel arch.

Reasons for Granting the Writ

1. The decision of the Court of Claims involves an erroneous construction of an Act of Congress that is not in harmony with what the Supreme Court has already decided and directed and is therefore of the class of cases which this Court will customarily review.

2. The decision of the Court below is predicated on an erroneous conclusion carried over from the old case and is in disregard of the new cause of action created by the Special Act.

3. The proper interpretation of an Act of Congress and the enforcement of a mandate of this Court are questions of public importance. Both questions are here involved.

Conclusion

The assigned errors and reasons for granting the writ asked will be discussed briefly in a brief accompanying this petition.

GEORGE ROBERT SHIELDS,
Counsel for Petitioner.

HERMAN J. GALLOWAY,
JOHN W. GASKINS,
FRED W. SHIELDS,

Of Counsel.